

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

WAHOO INTERNATIONAL, INC,  
Plaintiff,  
vs.  
PHIX DOCTOR, INC., a Florida  
Corporation; and DOES 1-10,  
Defendant.

CASE NO. 13cv1395-GPC(BLM)

**ORDER GRANTING IN PART  
DEFENDANT’S MOTION TO  
ALTER OR AMEND**

[Dkt. No. 84.]

Before the Court is Defendant’s motion to alter or amend, pursuant to Federal Rule of Civil Procedure 59(e) and 60(b), the Court’s order, filed on December 2, 2014, denying Plaintiff’s motion for default judgment and Defendant’s motion to set aside default as moot, and granting Plaintiff’s request for attorneys’ fees and costs. (Dkt. No. 84.) Plaintiff filed an opposition and Defendant filed a reply. (Dkt. Nos. 91, 92,) Based on the briefs, supporting documents, and the applicable law, the Court GRANTS in part Defendant’s motion to alter or amend the Court’s order. (Dkt. No. 80.)

**Background**

Defendant brings a motion to reconsider under Federal Rule of Civil Procedure (“Rule”) 59(e) and Rule 60(b). Plaintiff opposes.

Rule 59(e) provides for the filing of a motion to alter or amend a judgment. Fed. R. Civ. P. 59(e). Reconsideration of a motion for attorneys’ fees is not proper under Rule 59(e) because the motion does not seek to alter the final judgment. White v. New

1 Hampshire Dept. of Employment Security, 455 U.S. 445, 452 (1982); see also Amar  
 2 v. LSREF 2 APEX 2, LLC, No. 12cv969-JCM(RJJ), 2013 WL 1269637, at \* 1 (D.  
 3 Nev. Mar. 25, 2013). Therefore, Defendant's motion for reconsideration cannot be  
 4 brought pursuant to Rule 59(e).

5 Defendant also brings a motion to reconsider under Rule 60(b). It appears  
 6 Defendant is bringing the motion for reconsideration pursuant to Rule 60(b)(2); (4); (5)  
 7 and (6) as it quotes these provision of Rule 60(b). (See Dkt. No. 84 at 4.)

8 Under Rule 60(b),

9 the court may relieve a party . . . from a final judgment, order, or  
 10 proceeding for the following reasons:  
 11 (2) newly discovered evidence that, with reasonable diligence, could  
 12 not have been discovered in time to move for a new trial under Rule  
 13 59(b); (4) the judgment is void; (5) . . . it is based on an earlier  
 judgment that has been reversed or vacated; or applying it  
 prospectively is no longer equitable; or (6) any other reason that  
 justifies relief.

14 Fed. R. Civ. P. 60(b).

15 Rule 60(d) provides,

16 This rule does not limit a court's power to: (1) entertain an independent  
 17 action to relieve a party from a judgment, order, or proceeding; (2)  
 18 grant relief under 28 U.S.C. § 1655 to a defendant who was not  
 personally notified of the action; or (3) set aside a judgment for fraud  
 on the court.

19 Fed. R. Civ. P. 60(d).

20 The Court has discretion in granting or denying a motion for reconsideration.  
 21 Fuller v. M.G. Jewelry, 950 F.2d 1437, 1441 (9th Cir. 1991). A motion for  
 22 reconsideration should not be granted absent highly unusual circumstances. 389  
 23 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). "A motion for  
 24 reconsideration cannot be used to ask the Court to rethink what the Court has already  
 25 thought through merely because a party disagrees with the Court's decision. Collins  
 26 v. D.R. Horton, Inc., 252 F. Supp. 2d 936, 938 (D. Az. 2003) (citing United States v.  
 27 Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Az.1998)).

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## Discussion

The motion seeks the Court to “alter, amend, or reconsider its decision on December 2, 2014 granting attorney fees and setting aside the default.” (Dkt. No. 84-1 at 1-2.) However, it is not entirely clear what relief Defendant seeks in its motion and Defendant appears to believe that the Court granted Defendant’s motion to set aside default and that such an order is void. (Dkt. No. 84 at 4.) Defendant argues that the Court lacked jurisdiction of the case when the issue of default became moot when Plaintiff filed its amended complaint. (Dkt. No. 84 at 4-5.) Therefore, the Court was without jurisdiction to rule on the motion for attorney’s fees. (Dkt. No. 84 at 6.)<sup>1</sup> However, contrary to Defendant’s argument, the Court did not grant Defendant’s motion to set aside default. Instead, in line with Defendant’s argument, the Court denied Defendant’s motion to set aside default as moot. (Dkt. No. 80.) The Court does not disagree with Defendant that the amended complaint rendered the default moot.<sup>2</sup> However, Defendant provides no authority that as a result of denying the motion to set aside default as moot, the Court lacked jurisdiction to consider the request for attorney’s fees.

As to the award of attorneys’ fees and costs of \$9,749.50, Defendant summarily contends that the amount is substantially unreasonable in light of the parties’ individual circumstances and will force Defendant into bankruptcy which will only create more problems.

On December 2, 2014, the Court issued an order denying Plaintiff’s motion for default judgment and Defendant’s motion to set aside default as moot and granting Plaintiff’s request for attorneys’ fees and costs. In granting sanctions of attorneys’ fees

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<sup>1</sup>Defendant argues that its “request to set aside a default became moot when the amended complaint extinguished the default making relief impossible and a grant of the motion or attorneys fee void.” (Dkt. No. 84 at 6.)

<sup>2</sup>Defendant also raises an argument that it was properly served with the amended complaint; however, it is not clear how it concerns or affects the instant motion. The Court concluded Plaintiff was not required to serve Defendant with the amended complaint pursuant to Federal Rule of Civil Procedure 5(a)(2).

1 and cost, the Court explained:

2 In the Court's prior order setting aside default against Defendant, filed  
3 on March 17, 2014, the Court denied Plaintiff's request to condition a  
4 motion to set aside default on an award of attorney's fees and costs  
5 against Phix Doctor. (Dkt. No. 34.) In that order the Court noted that  
6 Defendant's conduct was not egregious but appeared to be  
7 "administrative mishaps." (*Id.* at 8.) But, in that order, the Court  
8 warned defense counsel that "if he continues to miss court deadlines  
9 without seeking relief from the Court, the Court may impose sanctions  
10 in the future." (*Id.*) In this instance, while the Court did not set aside  
11 the default due to the filing of the amended complaint, the Court finds  
12 it appropriate to issue sanctions against defense counsel for his  
13 continued dilatory conduct in missing deadlines and failing to comply  
14 with Court orders.

9 Since the prior order setting aside default, the "administrative mishaps"  
10 have continued with late and missed filing deadlines and another  
11 default entered against Phix Doctor causing many months of delay.  
12 Defense counsel has continued his dilatory conduct and failed to  
13 comply with court orders setting filing deadlines. In fact, defense  
14 counsel has acknowledged that the default was due to his conduct and  
15 not Defendant. (See Dkt. No. 71-1 at 5.) As a result of the continued  
16 conduct, another default was entered against Defendant, a subsequent  
17 motion to set aside default and a motion for default judgment had to be  
18 unnecessarily filed expending valuable and costly attorney resources  
19 of Plaintiff. Based on the continued conduct of defense counsel in  
20 failing to comply with court orders and deadlines, the Court now finds  
21 that sanctions are warranted.

16 (Dkt. No. 80 at 7-8.) Defendant argues that the Court lacked jurisdiction to make an  
17 award of sanctions under its inherent powers because it did not make a finding of "bad  
18 faith." However, the Court did not issue sanctions under its inherent powers, but  
19 pursuant to Nilsson, where the Ninth Circuit held that sanctions can be issued as a  
20 condition to setting aside a default and a finding of bad faith is not required. Nilsson  
21 v. Louisiana Hydrolec, 854 F.2d 1538, 1546-47 (9th Cir. 1988); see also Na Pali  
22 Haweo Comm. Ass'n v. Grande, 252 F.R.D. 672, 675 (D. Hawaii 2008) (Nilsson  
23 allows a court to condition the setting aside of a default on payment of a sanction  
24 absent a showing of bad faith).

25 Next, Defendant contends that Plaintiff was the reason for the delay in  
26 proceedings because it refused to stipulate to setting aside the default. Defendant  
27 argues the facts of the case are akin to Na Pali Haweo Comm. Ass'n v. Grande where  
28 the district court held that sanctions were not warranted as a condition of setting aside

1 default because the defendants' conduct did not rise to the requisite level of  
 2 egregiousness found under Nilsson. 252 F.R.D. at 675. In Grande, the defendants  
 3 asked for a voluntary extension of time to file an answer from the plaintiff who did not  
 4 respond and the defendants did not file a timely answer in order to avoid a Rule 11(b)  
 5 infraction. Id. at 673. The following day, July 16, Plaintiffs entered default, and on  
 6 July 19, defendants filed their answer and counterclaim. Id. Then on August 9, the  
 7 plaintiff filed a motion to strike the defendants' answer. Id. On August 11, 20 and  
 8 September 13, the defendants requested to plaintiff's counsel to voluntarily set aside  
 9 the default but the plaintiff's counsel declined. Id. On September 27, the defendants  
 10 filed a motion to set aside the default which was granted by the court after briefing. Id.  
 11 In declining to issue sanctions, the court explained that the plaintiff is the party that can  
 12 be seen as complicating the proceedings surrounding the initial granting of the default,  
 13 which caused both parties to incur unnecessary costs. Id. at 675. "Plaintiff obtained the  
 14 default on the first day the Federal Rules allowed and continually refused to respond  
 15 to the [defendants'] requests for a continuance and to voluntarily set aside the default.  
 16 Furthermore, Plaintiff challenged the [defendants'] Motion to Set Aside, in spite of  
 17 having almost no possibility of defeating the motion." Id.

18 Similarly, in this case, Defendant argues that Plaintiff has complicated the  
 19 proceedings and refused to set aside the default even while it was attempting to amend  
 20 its complaint which would have made the default moot. While Plaintiff could have  
 21 stipulated to a joint motion to set aside default, it is not responsible for the numerous  
 22 late filings and failure to comply with court orders.<sup>3</sup> In the motion to set aside default,  
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24 <sup>3</sup>Since the Court's order denying Plaintiff's initial request for attorneys' fees  
 25 filed on March 17, 2014, Defendant filed a late motion to dismiss on April 3, 2014  
 26 when the Court directed Defendant to file a responsive pleading by March 31, 2014.  
 27 (Dkt. Nos. 34, 36.) Defendant filed a late reply to its motion to dismiss on May 20,  
 28 2014 when it should have been filed by May 16, 2014. (Dkt. Nos. 37, 45.) Then,  
 Defendant failed to file an answer pursuant to Rule 12 when the Court denied  
 Defendant's motion to dismiss. (Dkt. No. 49.) As a result, default was entered. (Dkt.  
 No. 54.) Then, Defendant failed to timely file an opposition to Plaintiff's motion to  
 amend on September 12, 2014 but instead filed an opposition on September 17, 2014.  
 (Dkt. Nos. 60, 64.) As to Plaintiff's motion for default judgment, Defendant filed a late

1 defense counsel acknowledged that the default was due to his conduct and not  
2 Defendant. (See Dkt. No. 71-1 at 5.)

3 While the plaintiff in Grande was diligent in pursuing its case and the defendants  
4 created some of the problems in complicating the procedures, in this case, Defendant  
5 has not been diligent. The second default was entered on July 18, 2014, (Dkt. No. 54);  
6 however, a motion to set aside was not filed until three months later on October 15,  
7 2014. (Dkt. No. 71.) During those three months, the Court set an OSC hearing on  
8 September 2, 2014 for Plaintiff's failure to move for default judgment. (Dkt. No. 62.)  
9 The OSC hearing was held on September 26, 2014, where the Court allowed Plaintiff  
10 to file its motion for default judgment by October 10, 2014. Plaintiff filed a motion for  
11 default judgment on October 10, 2014. (Dkt. No. 68.) The round of filings on the  
12 motion for default judgment could have been avoided if a motion to set aside default  
13 had been filed shortly after default was entered in July 2014. While Defendant argues  
14 that plaintiff should have known that an amended complaint would make a default  
15 moot, Plaintiff had a legal argument that a default would not be mooted, despite the fact  
16 the Court ruled against Plaintiff.

17 Moreover, while Defendant attempts to point the blame to Plaintiff as the reason  
18 why sanctions should not be issued, Defendant's conduct goes beyond just the motion  
19 to set aside default. Default has been entered two times in this case.<sup>4</sup> Defendant has  
20 failed to comply with deadlines issued by the Court and as required under the Federal  
21 Rule of Civil Procedure, and Civil Local Rules. In a prior order setting aside default,

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23 opposition on November 10, 2014, instead of October 31, 2014. (Dkt. Nos. 70, 77.)  
24 Even the reply to the instant motion to alter judgment was filed one day late on January  
25 24, 2015 instead of January 23, 2014 as required by the Civil Local Rules. (Dkt. No.  
26 92.) These were all filed late without requesting leave of Court.

27 <sup>4</sup>In fact, request for entry of default has been filed three times in this case. The  
28 first time it was requested, Defendant, a corporation, appeared without counsel, and the  
Court set an order to show cause why Defendant shall not be default for failing to have  
counsel appear for the corporation. (Dkt. No. 10.) At the order to show cause hearing,  
Defendant appeared with counsel and the Court denied Plaintiff's request for default.  
(Dkt. No. 15.) This request for default was not due to the lack of diligence by defense  
counsel.



1 the Court denied Plaintiff's motion for attorney's fees stating that the errors were  
2 "administrative mishaps." However, since then, defense counsel has continually  
3 violated court orders, without seeking relief from the Court. More recently, on January  
4 9, 2015, the Court held an OSC hearing for Defendant's failure to file a timely answer.  
5 (Dkt. Nos. 82, 87.)

6 Lastly, Defendant contends that the attorney's fee award violates the equal  
7 protection clause because it has been "irrationally singled out as a so-called 'class of  
8 one.'" (Dkt. No. 84 at 12.) "To succeed on his 'class of one' claim, [Defendant] must  
9 demonstrate that the [Court]: (1) intentionally (2) treated [Defendant] differently than  
10 other similarly situated [defendants], (3) without a rational basis." Gerhart v. Lake  
11 County, Montana, 637 F.3d 1013, 1022 (9th Cir. 2011) (citing Willowbrook v. Olech,  
12 528 U.S. 562, 564 (2000)). Besides a conclusory allegation of an equal protection  
13 violation, Defendant fails to demonstrate that the Court intentionally treated  
14 Defendant's case different than others and without a rational basis.

15 Despite citing to Rule 60(b)(2), (4), (5), (6) and 60(d), Defendant has not  
16 presented any legal argument or presented additional facts that reconsideration is  
17 warranted. Accordingly, the Court DENIES Defendant's motion to alter or amend  
18 judgment on these provisions.

19 However, the Court has carefully reviewed its order granting attorneys' fees and  
20 reconsiders the amount awarded. The Court declines to award fees as to attorney hours  
21 spent responding and attending the hearing regarding dismissal for failure to file for  
22 default judgment. While Plaintiff states that defense counsel had represented that he  
23 would be moving to set aside default, Plaintiff did not move for default judgment any  
24 time after the deadline of August 17, 2014. Based on past history, Plaintiff could have  
25 recognized that Defendant was not going to file its motion to set aside default or file  
26 it timely. On September 2, 2014, the Court set an OSC for September 26, 2014 and  
27 Plaintiff filed its motion for default judgment on October 10, 2014. While Defendant's  
28 default and failure to file a motion to set aside default caused the delay and unnecessary

1 work by Plaintiff, Plaintiff was partly responsible for the OSC proceedings.  
2 Accordingly, the Court declines to award attorneys' fee for work done in responding  
3 to the OSC and attending the hearing. In her brief, Plaintiff's counsel only provides  
4 a lump sum of the attorneys' fees without identifying what portions of the fees are  
5 attributed to specific work. Without such information, the Court reduces the amount  
6 of attorneys' fees by \$4000.00. Accordingly, the Court GRANTS in part Defendant's  
7 motion to alter or amend judgment.

8 **Conclusion**

9 Based on the above, the Court GRANTS in part Defendant's motion to alter or  
10 amend judgment and reduces the amount of attorneys' fees and cost award to  
11 \$5,749.50. Defendant is hereby ORDERED to comply with the Court's order and pay  
12 Plaintiff \$5,749.50 within three months of this Order.

13 IT IS SO ORDERED.

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15 DATED: January 29, 2015

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17 HON. GONZALO P. CURIEL  
18 United States District Judge  
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